No. 15234

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACME DISTRIBUTING COMPANY, CALIFORNIA BEVERAGE & SUPPLY CO., and YOUNG'S MARKET COMPANY,

Appellants,

vs.

JOHN COLLINS, doing business as Stan's Stage Coach Stop, alleged bankrupt,

Appellee.

OPENING BRIEF OF APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

TEXTBOOKS

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OPENING BRIEF OF APPELLANTS.

This is an appeal from an order of Judge Leon R. Yankwich, United States District Judge for the Southern District of California, in which he reversed an order of Referee Benno M. Brink who on two separate and distinct occasions had adjudicated John Collins to be a bankrupt.

On review taken the first time from the original order of adjudication on the plea that the bankrupt wanted an opportunity to present his wife who allegedly was sick in the hospital on the last day of the trial before Referee Brink, Judge Yankwich remanded the matter to the Referee to take the wife's testimony and the testimony of

such other witnesses as might be offered as to the circumstances under which the title of the real property then standing of record in the name of the wife of the bankrupt was carried, and instructed the Referee to make such changes as he might desire in the findings to the court and make the same, or such other ruling as he might deem proper. [Tr. p. 22.]

Upon remand, the Referee reopened the matter on March 14, 1956, and took the testimony of Mrs. Collins. [Tr. p. 281, *et seq.*] After hearing Mrs. Collins' testimony, the Referee still remained unconvinced that title to the home occupied by the bankrupt and his wife, on which there was a homestead declaration, was taken in the name of the wife only for the sole purpose of convenience, and he was convinced that if the property were vulnerable to attack by the trustee, in the absence of a homestead declaration filed before bankruptcy, the bankrupt and his wife would not have insisted that this exempt homestead was community property as contended by them.

Referee Brink reiterated his former findings.

A second review was taken by the bankrupt and this time Judge Yankwich reversed Referee Brink entirely, filing a memorandum opinion which is found in the Transcript, page 26b, and made new findings, conclusions of law and order decreeing Collins not to be a bankrupt and reversing the former order of the Referee. [Tr. pp. 36-40, incl.] From that order the petitioning creditors have taken this appeal.

The Jurisdiction.

The jurisdiction of the United States District Court was invoked under the provisions of Section 4b of the National Bankruptcy Act (11 U. S. C. A., Sec. 22), which provides that any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipality, railroad, insurance or banking corporation, owing debts to the amount of $1,000.00 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this Act.

The act of bankruptcy invoked against this bankrupt was what is commonly known as the first act of bankruptcy which consists of the bankrupt having

> "concealed, removed or permitted to be concealed or removed any part of his property with intent to hinder, delay or defraud his creditors, or any of them, or made or suffered a transfer of any of his property, fraudulent under the provisions of section 67 or 70 of this Act." (11 U. S. C. A., Secs. 3a and 106d(5).)

The act of making the transfer without any consideration as in this case in the face of creditors' claims placed the burden on the bankrupt to prove that he was solvent. (Bank. Act, Sec. 3c; 11 U. S. C. A., Sec. 21c.)

The jurisdiction of the District Court on review was invoked under Section 39c of the National Bankruptcy Act (11 U. S. C. A., Sec. 67c).

The jurisdiction of this court is invoked on appeal under the provisions of Section 24a and b of the National Bankruptcy Act (11 U. S. C. A., Sec. 47a and b).

The History of the Case.

John Collins and his wife were formerly residents of Niagara Falls, New York. [Tr. p. 48.] They had a bank account in Niagara Falls out of which they had made their last substantial withdrawal about 1953. The bank accounts were scattered in several different banks in Niagara Falls and consisted, so the bankrupt believed, of checking accounts. [Tr. pp. 48, 49 and 50.] The bankrupt engaged in the business of a cafe and cocktail lounge up until about September, 1954. [Tr. p. 45.] He had a dispute with an associate Stan Lefringhouse whose status was in dispute throughout the trial as to whether or not he was a partner of Collins, or merely a manager of the retail liquor business. [Tr. p. 45.] When this dispute ensued, Collins took a part of the liquor which was in the cafe out to his home and put it in his garage. This approximated fifty or sixty bottles, or possibly thirty or forty, but the bankrupt could not tell us exactly how many, when examined under Section 21a at the time the receiver was trying to round up any property which the bankrupt had. [See Tr. p. 46.] Some of it was served at parties given in Collins' home, and some was given away as Christmas presents, and the balance was either drunk by Collins or left in the garage. [Tr. p. 47.] He could not give us a figure on September 6, 1955, as to the value of the liquor he had on hand when the receiver was trying to round up his property, but placed it somewhere in the vicinity of $400.00 or $500.00. [Tr. p. 47.]

He had moved to California in October, 1951, coming from Niagara Falls, New York. [Tr. p. 48.] In September or October, 1951, his wife bought a new car, a 1951 Chrysler. [Tr. pp. 52, 53.] Title to this car was taken in the wife's name. The bankrupt had intended to buy his wife a cheap car, but her father said he would

put in the extra money to buy her a good car. [Tr. p. 54.] The wife claimed this car belonged to her and it was encumbered, in addition. [Tr. pp. 53-54.]

The bankrupt's father had died about eighteen months prior to September 6, 1955, and had left a home in Niagara Falls, New York, to the bankrupt's mother apparently, according to the bankrupt's version, a life estate vesting in his mother with the remainder to be divided between the bankrupt and the "kids" upon her death. [Tr. p. 55.]

The home in which the bankrupt lived in this state stood in the name of his wife. [Tr. p. 56.] (Apparently the reporter misunderstood the pronunciation of the wife's name and reported it as "Eda J. Collins.") Her correct name is Ada J. Collins. The bankrupt testified, at the time when the receiver was seeking to round up his assets, *that his wife claimed this home property as her own.* [Tr. p. 56.] The evidence does not indicate that at that time he was claiming any interest in the property. Later on, when it became a material element in determining whether or not he was solvent, at the date of the fraudulent transfer of his liquor license to a friend, he changed his story to contend that the property was community property instead of his wife's separate property.

The Pleadings.

As hereinbefore stated, the involuntary petition filed on September 8, 1955, alleged that the bankrupt was indebted to the Acme Distributing Company in the sum of $417.00; California Beverage & Supply Co. in the sum of $955.00, and Young's Market Company in the sum of $242.07, and that within four months immediately preceding the filing of the petition, the bankrupt had made or suffered a transfer of his property, fraudulent under the provisions of

Sections 67 and 70 of the National Bankruptcy Act by causing a transfer of his Distilled Spirits License to one Fred De Carlo, without any consideration, thereby rendering himself insolvent; that the liquor license was worth between $4,500.00 and $5,000.00 and that he had placed it beyond his control to such an extent that neither he nor a bona fide purchaser from him could obtain greater rights in said liquor license than the said Fred De Carlo. [Tr. pp. 4-10, incl.] In reply to his petition, the bankrupt filed a verified answer in which he expressly denied allegation No. III that he owed any of the bills set forth by the petitioning creditors in their involuntary petition. The undisputed testimony of W. J. Ryan of the Acme Distributing Co. of Pasadena [Tr. pp. 63-65], Charles A. Wright of the California Beverage & Supply Co. [Tr. pp. 65-68], and J. Walter Phelps of Young's Market Company [Tr. pp. 68-70], demonstrated the untruthfulness of this bankrupt's denial and first shook the Referee's faith in his credibility. He owed the amounts claimed to all three of these petitioning creditors. [Finding No. 2, Tr. p. 15.]

The value of the liquor license in question was indisputably established by the testimony of Ralph Meyers, an experienced liquidator, at between $4,500.00 and $5,000.00. [Tr. p. 71.] The liaison officer between the Department of Alcoholic Beverage Control and the Board of Equalization, Roscoe Z. Matthews, testified that the proceedings involving the transfer had so far progressed that the license could not go back to the bankrupt because he decided that he wanted to rescind. (11 U. S. C. A., Sec. 106d(5).) The bankrupt admitted that he had made an application to transfer the liquor license to Fred De Carlo and that Fred De Carlo was paying nothing for the transfer to him. [Tr. pp. 78, 79.] The bankrupt

was not able to enlighten us as to his opinion as to the value of the license [Tr. p. 79], so the testimony of Ralph Meyers that it was worth between $4,500.00 and $5,000.00 stands uncontradicted. At that point, counsel for the bankrupt handed counsel for the petitioning creditors a statement of the bankrupt's assets and liabilities in which there was included a home described as Lot 19, Tract 16868 valued at $15,000.00 and which *stood in the name of his wife.* [Tr. p. 79.] Included in this list of assets and liabilities was $1,500.00 in cash which the bankrupt claimed he had at the time of the transfer of the liquor license, August 4, 1955. [Tr. p. 79.] He admitted that at the date of the filing of the involuntary petition, the home stood in his wife's name. He also testified that he had approximately $1,500.00 in his possession on or about August 2, 1955, when William A. Wylie was appointed receiver for his estate under the provisions of Section 2a, subdivision (3) of the National Bankruptcy Act (11 U. S. C. A., Sec. 2a(3).) He did not tell the receiver about this alleged $1,500.00 which he claimed he had in his personal possession at that time. He attempted to evade answering this question directly on the ground that he had never seen Mr. Wylie, the receiver, and that one of Mr. Wylie's representatives had called on him only about three days before he was examined on November 4, 1955. [Tr. pp. 80, 81.] This evasive testimony was belied by the testimony of Harold Harris, agent for William A. Wylie, the receiver, which is found at page 118, *et seq.,* of the Transcript. Harris testified that he contacted the bankrupt at his home shortly after Wylie was appointed receiver in the bankruptcy proceeding; that he had made an inventory of the stock of liquor which he had stored out there at his home, and that he had asked Mr. Collins if there were any other assets any other place and that

Collins denied that there were. [Tr. p. 119.] Harris was asked this question:

> "Q. Did he tell you he had cash in his possession consisting of uncashed compensation checks in the sum of $1500? A. No, sir.
>
> * * * * * * * * *
>
> Q. Did he tell you he had an unliquidated claim against Davis Piping and Ream Manufacturing Company, on which he had been offered a settlement of $3500? A. No."

The evasive denial of contact with the receiver up until three days before the trial, was explained very completely by Mr. Harris on Cross-examination. [Tr. p. 119.] About five weeks before the trial Harris had contacted Collins on the telephone. He had spoken to him at various times up until the Saturday preceding the trial when he had taken the inventory of Collins' liquor. [Tr. p. 119.] At page 120 of the transcript, Harris reiterated:

> "A. I asked him: Are there any other assets that I should know about?"

Further at page 121 of the Transcript, Harris testified as to his efforts to appraise the household goods of the bankrupt, listed as an asset, at his home at 10423 Townley Drive, Whittier. He was unable to gain access to the bankrupt's home, although he and Walter Stern, a witness who testified at page 127, *et seq.,* of the Transcript, repeatedly rang the bell at the bankrupt's home, and after remaining there an hour and fifteen minutes without an answer, left. He again attempted to contact the bankrupt on November 15th by telephone with no success. [Tr. p. 121.] On November 12th he had talked to a little girl on the telephone, but did not get to talk to the bankrupt. He tried to get him again the morning of the trial at

7:45, and the same little girl answered the telephone and said her father was not at home. Harris had no chance to talk to him on that occasion. [Tr. pp. 121, 122.]

He had, however, made an inventory of the stock of liquor which the bankrupt was keeping in his garage. The greater percentage of the liquor bottles were open. [Tr. p. 122.]

The value placed on the stock of whiskey found in the bankrupt's garage by Harris was about $500.00. [Tr. p. 119.] The meticulous way in which Harris took this inventory is demonstrated by the fact that he even broke down the bottles which were open, into decimals of tenths. For example, he listed one item of D.O.M. liquor (Benedictine) as 9/10 of a quart, and on the page immediately preceding were some bottles that were marked "3/10."

The elusive conduct of this bankrupt was further demonstrated by the testimony of Walter F. Stern which begins at page 127 of the Transcript. Stern had been an adjuster for the Credit Managers Association of Southern California for over thirty-two years. He had had occasion to handle stocks of all kinds. He was familiar with the value of cars and of liquors. Pursuant to request from the office of counsel for the petitioning creditors, he met the receiver's agent, Harold Harris, at the home of the bankrupt on November 11th, arriving there at approximately 8 o'clock in the morning. [Tr. p. 127.] Standing in the driveway of the place where he met Harris was a Ford car. A blonde young man came out of the house, opened the door of the Ford, took out some pieces of mechanism, and went out to the curb where there was a Chrysler convertible and put the pieces of mechanism in the passenger compartment of the Chrysler. [Tr. p. 128.] The front part of the Ford was jacked up and the drive shaft was down on the concrete.

It certainly is puzzling why Harris was unable to gain entrance to the bankrupt's home after waiting an hour and fifteen minutes and repeatedly ringing the door bell [Tr. p. 121] when it is clearly evident that there was some one at home who came out the back door and removed part of the mechanism of the Ford and put it in the Chrysler. Were it not for this testimony, one might be left to speculate as to whether the door bell was not answered because no one was home, but it is clearly evident from the testimony of Stern that there was at least a young fellow in the house who for some reason or other took parts of the Ford jacked up in the driveway and placed it in another car.

Another item of assets which the bankrupt claimed in his list of assets and liabilities prepared for use at the time of the trial were 1,000 phonograph records which he valued at $1.00 apiece, or $1,000.00. Walter Stern testified that these phonograph records were worth about 5¢ each. As we will point out later, the bankrupt was closely allied with the juke box business [Tr. pp. 107-108] and his valuation of his phonograph records was decidedly inflated, to put it mildly.

In his list of assets he put in his furniture at cost $4,000.00, which he had bought in 1952, 1953 and 1954. Stern testified that the furniture purchased two years ago at a cost of $4,000.00 would not be worth $1,000.00 today (the date of the beginning of the trial, or the preceding August, the date of the filing of the petition).

Included among the other "assets" the bankrupt put in an unliquidated claim for $3,500.00, which he claimed was a compensation claim, but was unliquidated and disputed. [Tr. p. 81.] That this claim was most decidedly disputed and denied by the insurer is evidenced by the testimony of Lloyd D. Crayne. [Tr. pp. 131-135, incl.]

Another alleged asset claimed by the bankrupt in the list was the cash surrender value of insurance policies roughly around $1,700.00, a claim for damages in connection with an injury to his son which was unliquidated, hand tools which he valued at $1,000.00 consisting of wrenches, saws, power tools, an electric saw, a metal cutter and other things that he used in his trade as a steam fitter [Tr. p. 82]; an interest in money held in escrow in the Vista Escrow Company in the amount of $3,000.00 [Tr. p. 83]; fixtures in Norwalk which he listed at $7,000.00 [Tr. p. 85]; and a claim against Stanley E. Lefringhouse of $2,300.00 which Lefringhouse vigorously denied owing him [Tr. pp. 100, 101] and certain accounts receivable listed and handed to counsel for the petitioning creditors [Tr. p. 115], which contained no addresses of the debtors and was received in evidence as Petitioning Creditors' Exhibit 3. [Tr. p. 116.]

The $3,000.00 in escrow which Collins claimed as an asset evaporated speedily when the escrow papers were produced and it was stipulated by counsel for both sides that the amount in the escrow at the date of the trial was only $123.08 instead of $3,000.00 as claimed by the bankrupt.

The accounts receivable likewise deteriorated rapidly. They consisted of names and amounts written on a sheet of paper with no addresses. A fair sample of their collectibility is evidenced by the bankrupt's examination at page 136, *et seq.*, of the record For instance: "Bill's check, $16.50." Bankrupt doesn't know his address. The only information he could give us about it was [Tr. p. 137] "I got a check from a 'Bill' $16.50. It was a check he gave me and I took it to the bank. It was money I loaned him out of my pocket outside of the bar." [Tr. pp. 137, 138.] "Dutch" listed at $77.45, was a man who

came in the bar and constituted a bar bill at the Schooner Cafe. Bankrupt did not know where he lived except it was in the 4300 block on Olive Street. "Clete" was another fellow who was at the bar. "Shorty Sharpe" $37.05, lived close to the bar. Part of the account receivable was cash and part a bar bill. "T. A. Sharpe" was a brother of "Shorty Sharpe," "Lloyd" $100.00 was for a paycheck which he had cashed for him at the bar. He lives on Florence Place somewhere, on the corner of Florence Place. There are some motels there, and he lives right next to them. "Nolan" $10.50, lives at Bell Gardens. That was a bar bill. "Paul" $1.55, he used to clean the place—clean up around there. "Spohn" $10.25, is a man who sells Mercury-Lincoln automobiles. Bankrupt did not know where he lived, but saw him once in a while. "Smitty"—bankrupt could not tell where he lived. "Jimmy & Cliff" $2.85, a bar bill. "Bart," the man's last name. [Tr. pp. 136-140, incl.]

The bankrupt had listed this silly list of accounts receivable at $2,200.00 as an asset. Asked on page 139 of the record what he would believe they were actually worth as the owner thereof, he lamely answered at page 140:

> "A. If you collect them all they are worth $2,200.00."

Questioned further at page 140 about one of the debtors named "Tex" $27.55, the only way the receiver or the bankrupt could locate him would be to go out and look for him, or wait until some time when the bankrupt saw him and asked him for it. The bankrupt testified that that was about the way he would collect those bills. [Tr. p. 140.]

We next went into the uncashed compensation checks which we demanded that he produce in court at the ad-

journed hearing on November 14, 1955. He had listed these as an asset amounting to $1,500.00. [Tr. p. 141.] To our surprise, he produced none of them. He testified that he had cashed them. [Tr. p. 151.] He was questioned as to how many of these checks he had in his possession on August 22nd, the date of bankruptcy, and he admitted that he could not tell us. [Tr. p. 141.] This, notwithstanding the fact that he had called Mr. Weller, one of the attorneys for the petitioning creditors, and very obligingly told him that he would be at home to receive the service of the involuntary petition about the 25th of August, three days after the petition was filed. [Tr. pp. 141, 142.] Pressed further, he was asked:

> "Now, at the time you had your conversation with the United States Marshal and with Mr. Weller, did you have in your possession uncashed compensation checks of the value of $1,500.00? A. I doubt that very much." [Tr. p. 142.]

If he had $1,500.00 in uncashed compensation checks in his possession at the date of bankruptcy, it was his duty to so inform his reeciver, but as we have heretofore demonstrated, he did not do so. He listed them as an asset when the case came to trial, and when demand was made that he produce them, he could not do so because he had cashed them.

At this point, it might not be inappropriate to diverge for a moment to quote from the opinion of the late Judge Benjamin F. Bledsoe in the matter of *Jacobson & Berman,* 298 Fed. 542 at 544:

> "His admission that, without authority, in a secretive manner, and without the knowledge of his partner, he appropriated sums approximating $40,000 of the partnership funds, wherewith to go to Tia Juana, Mexico, and other places, and play and lose the same

upon the races and other forms of gambling, is sufficient in itself to destroy any vestige of integrity that might ordinarily attach to his statements, and justify the court in declining to believe any part of his extraordinary tale. An honest man would not do the things that he did. His admission that he did do them is an admission that he is dishonest. Being dishonest, his testimony may not be relied upon or accepted. In addition to that, the testimony of his partner and other witnesses in no wise serves, in my judgment, to corroborate his lurid tale. I am confident that the referee was entirely right in declining to be bound by it merely because it was proffered under oath."

At page 147 of the Transcript, he testified that on the day he went to the hospital he gave his wife their life savings "he would say to live on while he was in the hospital because he figured he could be in there about fifteen weeks." He testified that he kept his life savings at home; that they were not deposited in any bank; that they were in the form of currency and kept in a paper envelope, and that he went to the hospital on June 10 or 11, 1955. This was approximately three months before the date of bankruptcy. He had filed the application for the transfer of the liquor license on August 5, 1955.

We then came to the two cars which he claimed as an asset. One of them was a 1951 Chrysler, and the other a 1952 Ford. [Tr. p. 148.] He valued the Ford at $600.00. [Tr. p. 149.] However, he admitted at page 148 that it was jacked up, but tried to avoid the damage contained in his answer which corroborated the testimony of Walter Stern by saying:

"However, I did not see it jacked up, or I did not see it in the driveway." [Tr. p. 148.]

The next asset was a claim for damages against the All State Insurance Company, apparently the insurance carrier for some man who had injured his son while driving an automobile. This alleged asset was unliquidated and was in litigation. [Tr. p. 149.] At least, he believed he had a suit filed as guardian for the boy on the boy's behalf. [Tr. p. 150.] He put this claim in his list of assets at $400.00, and claimed that the driver of the car had run the boy down, that they had to take him to the hospital in an ambulance, and smashed up his bicycle, and that he had to have a doctor, and various bills of that nature. [Tr. p. 150.] There is nothing in the testimony to indicate whether the driver of the car was at fault, or whether the boy had smashed into the car with his bicycle. Yet, Collins claimed this as an "asset."

At page 151 of the Transcript, he described the small hand tools, the vise, and the cut-off saw which would be exempt, but which he claimed as an asset.

We have heretofore touched on the relationship between the bankrupt and Stanley Lefringhouse as being an uncertain relationship. At page 152 of the Transcript, he testified that Lefringhouse was the manager of the business and testified that he and Lefringhouse were the owners thereof. Lefringhouse, on the other hand, claimed the exclusive ownership of the equipment in the place of business and stated that it would not bring in over $1,000.00 to $1,500.00 under the hammer. [Tr. p. 191.] At page 188, Lefringhouse denied that Collins owned anything in the place of business at 13113 South San Antonio, Nowalk. At page 189, he testified that he did not know what had become of the glassware which was in the bar and that the first he ever heard Collins mention glassware was at the hearing on the contested adju-

dication. [Tr. p. 189.] He testified that Collins had gone into the place of business when he, Lefringhouse, was not there, took the license, took the liquor, and then came back the next day, and after he got in there Lefringhouse knew that Collins was taking the liquor and did not stop it. He said that Collins did not make any inventory or anything at the time that he took the liquor out of the place of business. [Tr. pp. 189 and 190.] When Collins got through there was no liquor left in the place of business.

The witness, Lichtenfeld, who had entered into a deal some time in January, 1954, to purchase the bar, and in connection with which an escrow had been opened with the Vista Escrow Company [Tr. pp. 156-163], had deposited $3,000.00 in the escrow. Collins had attempted to claim $3,000.00 in escrow as an asset. After examining the escrow papers (we did not produce Mr. Waltreous of the Vista Escrow Company because he was under subpoena in the Superior Court in Long Beach at the same time) [Tr. p. 134], a stipulation was entered into [Tr. p. 135] that if Waltreous were present, he would testify that there was only $123.08 in the escrow instead of the $3,000.00 as Collins claimed. Lichtenfeld denied that he owed the bankrupt, John Collins, the sum of $3,000.00 as Collins claimed. [Tr. p. 166.]

Both sides rested [Tr. p. 175] and the Referee then thoroughly summed up the problem to date from the bench. He then called for an "in-between" conference for November 21st at which time the insurance policies could be analyzed and any party in interest would have an opportunity to sit in on it, the conference to be held in Referee Brink's court room. This conference was not reported, but on December 5th the hearing was again resumed with

Collins being called under the provisions of Section 21j of the National Bankruptcy Act (11 U. S. C. A., Sec. 44j).

After the interim conference at which the insurance policies were examined, Collins was asked this question [Tr. p. 182]:

> "Q. Now, isn't it a fact that most of these insurance policies that you claim a cash surrender value on are policies on somebody else's life? A. They are are policies on my children's lives, if that is what you are referring to.
>
> Q. And you are claiming the cash surrender value on policies on your children's lives? A. Yes. Can't I? I believe I am beneficiary on the major portion of them."

At page 199 of the Transcript the bankrupt was shown a grant deed dated December 7, 1951, to Ada J. Collins, a married woman, and was asked if that covered the property where he and Mrs. Collins then lived. His answer was:

> "A. Yes, it does."

He denied that he instructed the escrow department handling the transaction for the sale of this property to place the title to the property in the name of Ada J. Collins. Commencing at page 201 of the Transcript, he went into detail on the circumstances surrounding the transaction whereby the home was acquired in his wife's name. We quote [Tr. p. 202]:

> "Mrs. Bailey (the escrow officer) said something about community property, and asked me if I knew what it was all about; and she said, 'If you want to put this property in your wife's name, that is, it is her property and you have nothing to do with it,

you will have to sign off these extra papers they have in the bank, or the title company,' she said, would not issue the title.

I said I did not want it to be her separate property; it came from our life savings, it belonged to all five of us, my wife and three kids. Anyway, she went ahead and my wife signed the paper and made the arrangement with the title company, they insured it on the assumption it was community property.

Well, the question came up after the escrow was over—we had moved in the house, and someone had told us, 'If you live in the State of California they give you a thousand dollars' worth of exemption in your taxes, if you are a Veteran.' And, so, I applied for it—my wife went down and asked about it.

They said, 'You will have to bring the veteran in with you,' because the house was in her name; and so we did,—we went to the place and signed up. I was assuming responsibility for the tax the same as Ada. The house was put in her name for convenience of signing papers in a quick transaction, so that she could move it. They went ahead and grabbed the thousand dollar exemption, and I have been getting it all the time, ever since we got the house."

This testimony is in rather sharp contrast with the testimony given by the bankrupt at the time the receiver was trying to get the property together. He was asked [Tr. p. 56]:

"Q. In whose name is your home standing? A. Ada J. Collins.

Q. Is your name on it? A. No.

Q. Does she claim it as her own property, do you know? A. Well, she says it is. I don't know. We bought it in 1951, when we came here.

* * * * * * * *

Q. Has anyone declared a homestead on the property? A. My wife, I think—I think she did, when *she* bought the house." (Italics ours.)

At page 216 of the record after the conclusion of the testimony regarding the homestead property, the Referee said:

"The Court concludes that the evidence here presented is not sufficient to overcome the presumption of separate property. You may proceed."

The rest of the testimony at that hearing pertained to the chaotic deals between Collins, Lefringhouse and Lichtenfeld which were so mixed up that it was clearly evident that any claims which Collins might have against either Lefringhouse or Lichtenfeld were highly debatable and did not constitute an asset.

The trial resumed December 6, 1955. [Tr. p. 235, *et seq.*] Collins' testimony at that hearing pertained to his transactions with Lichtenfeld and Lefringhouse, and to a loan which he had made to one Joseph Kaiser in June of 1954 in the sum of $960.00 which he likewise claimed as an asset. [Tr. p. 241.] He had no documentary evidence of that loan. [Tr. p. 242.] Kaiser said he would pay Collins back when he made the money on another job. He believed the loan had been made in cash which he had kept in his home and which he did not believe he had on deposit in the bank. [Tr. p. 243.] We believe a trustee in bankruptcy would encounter considerable difficulty in collecting this loan from the mysterious Mr. Kaiser who lived somewhere in Covina or West Covina. [Tr. p. 244.] He then went into the values which he placed on the phonograph records. [Tr. p. 245.] One record by Ernestine Schumann-Heinck he claimed was of the value of $50.00; another album of thirteen records called the Catholic

Church Record Club, he valued at $100.00. On cross-examination he was confronted with the fact that at the time he was examined in the bankruptcy court on September 6, 1955, when the receiver was seeking to locate his assets, he had mentioned nothing about the loan which he now said he had made to Mr. Kaiser in June of 1954. He was also confronted with a document, Bankrupt's Exhibit 11, in which it was

> "specifically understood and agreed that between the Sellers, Stanley E. Lefringhouse, is the sale (*sic*) of the furniture, fixtures and equipment, goodwill, lease, trade name, inventory, etc., and the only interest John Collins has is the on-sale liquor license, all funds due at the close of escrow herein to the seller shall be paid solely to Stanley E. Lefringhouse with no monetary interest of any nature whatsoever to John Collins." [Tr. pp. 247-248.]

He was asked whether or not he had claimed an interest in the fixtures, equipment, inventory, etc., at the time that he had signed Bankrupt's Exhibit 11, and he gave the lame answer:

> "A. Yes, it was with the understanding of this $5,500.00 that Stanley Lefringhouse signed."

Going further into the muddled transactions between the bankrupt and Lefringhouse, he was asked the following questions [Tr. p. 248, *et seq.*]:

> "Mr. Tobin: Yes. In what sum did you get the $2,500.00 of that $3,500.00 check, a check or cash, or what? A. Well, at first I gave Lefringhouse a check for $2,500.00. He went to the bank and could not cash it, and I had to go to the bank and cash it and brought the cash to him.
>
> Q. What did you do with the cash? A. I gave it to Stan Lefringhouse.

Q. Do you know a man by the name of Louis Trapini? A. Yes.

Q. What is his occupatoin? A. I believe he was a liquor salesman.

Q. Do you know where he is now? A. I believe he is in Los Angeles.

Q. He is in the penitentiary, is he not? A. I don't believe so.

Q. Is it a fact you gave this $3,500.00 to Louis Trapini? A. And would I get Stan Lefringhouse's signature?

Q. The question is, did you not give the $3,500.00 to Louis Trapini in cash? A. That is not true; that is absolutely not true."

Lefringhouse was then called to the stand, commencing at Transcript, page 252. His version of the transaction was set forth as follows [Tr. p. 256]:

"A. I was running a bar in the same place there in 1952; and I had gone down to the State Board many times, to try to get a liquor license; and each time I would go down they would say, 'We are not issuing them; put in your name on the list.' John (Collins) and Larry (Collins) were in this juke box business and they came to me and they said they could get a license for $3,500.00, and they would get it for me, and I would pay them $5,500.00 back, with a note of $150.00 a month. And, so what happened, John Collins wanted Larry Collins to go down with me to the Bohemian Distributing Company and meet Louie Trapini.

Q. What did you do with the $1,000.00? A. I gave it to John's brother, Larry Collins. We went down and paid Louis Trapini $1,000.00 on this liquor license.

Q. You paid $1,000.00 on the liquor license? A. Yes; and Trapini was going to 'grease the track' and see that the liquor license was issued.

Q. How did you give the thousand dollars into this matter? A. As I recall, I went up to John Collins' house, and his wife wrote a check. I met Larry Collins down at our place, at the liquor store, the bar, and went over to the bank and cashed the check with Larry Collins and went down and gave him the money, and went down to the Bohemian Distributing Company.

Q. Your testimony is, you gave $1,000.00 in cash, is that right? A. That's right.

Q. Did you later on receive $2,500.00 from Mr. Collins? A. I did not."

After further discussion of the bankrupt's insurance policies, including his health and accident policies covering surgical expense benefits, laboratory, X-ray expense benefits, and additional accident expense benefits [Tr. p. 263], the hearing was then adjourned to December 8th at 10 o'clock. At that time, he was questioned regarding an additional $4,100.00 of liability owing to his brother, Lawrence Collins, which case No. 639,780 was pending in the Superior Court. He had not included that figure among his liabilities. His deposition had been taken in connection with that suit and a court reporter's bill remained unpaid for a copy of the deposition. [Tr. pp. 266, 267.] At page 268, the Referee summarized the bankrupt's liabilities at $8,867.23, and said that he would make no comment on the Collins-Lefringhouse note which was then in suit in Superior Court action No. 639,780. On the asset side, he gave him credit on the furniture at a value of $2,000.00, the tools at $300.00, his phonograph records at $150.00, the liquor in his garage at

$200.00, the bar glasses at $40.00 [Tr. p. 269], the accounts receivable as of no value whatsoever; the Columbia National Life Insurance Company policy cash surrender value $180.28; Metropolitan Life Insurance Policy, $134.92; Policy No. 16245450, $60.25; Policy No. 540980754, no cash surrender value, and the group of policies, five in number, on the lives of Ada Collins, John R. Collins, Paul Andrew Collins, Ada J. Collins and Pauline J. Collins, the cash surrender value was payable to the insured and not to the bankrupt. [Tr. pp. 270, 271.] The Referee, at page 273, arrived at the total cash surrender value on all policies of $1,403.75.

He found the claim against Lefringhouse to be entirely unliquidated and that it was impossible in this proceeding to determine whether it constituted an asset or a liability, and included in that was the $4,100.00 note signed by both Collins and Lefringhouse. He eliminated the Lefringhouse transaction entirely, either as an asset or liability. [Tr. p. 274.] He eliminated the unliquidated claim for damages to the minor son, on the same page. He commented that the evidence on the $1,500.00 worth of uncashed checks was so vague that the court must make a finding that no such assets were in evidence.

It was the duty of the bankrupt to have turned over any assets which he claimed to the receiver who was the predecessor of the trustee in bankruptcy to be thereafter elected. This, he did not do. This court in *Gardner v. Johnson,* 195 F. 2d 717, following the rule laid down in *Chicago, B. & Q. R.R. v. Hall,* 229 U. S. 511, said:

> "It is true that title to exempt property does not vest in the trustee, and cannot be administered by him for the benefit of the creditors. But it can pass to the trustee as a part of the estate of the bankrupt, for

the purposes named elsewhere in the statute, included in which is the duty to segregate, identify, and appraise what is claimed to be exempt."

In fact, concealment of assets from a receiver is in itself a felony under Title 18, U. S. C. A., Section 152. He found the deposit with the Vista Escrow Company of $3,000.00 to be so indefinite that no asset value could be attached to it and that Mr. Collins had no asset so far as the Vista Escrow was concerned. He then took up the compensation claim in which the bankrupt had indicated there might be a recovery of $3,625.00 against which there was a lien of $1,000.00. He pointed out that there would be an attorney's fee payable against such award, if definitely made. At the suggestion of bankrupt's counsel, Miss Hofstetter, the Referee pared down the anticipated attorney's fee to $250.00 which was stipulated to by counsel for the petitioners. At page 277, counsel for the bankrupt said that she could not think of any other assets. The court then concluded that the bankrupt was actually insolvent and directed the preparation of findings accordingly.

In the findings of fact filed by the Referee [Tr. p. 16], the Referee found that the bankrupt was insolvent and that all of his assets, including property which would be exempt under the laws of the State of California taken at a fair valuation totaled in value the sum of $7,068.75, and that his total liabilities as of the date of filing of the involuntary petition amounted to, and did then amount to, the sum of $8,800.67, and that he had committed an act of bankruptcy in transferring his liquor license to his friend, Fred De Carlo, without consideration within four months prior to the filing of the petition. [Tr. pp. 15, 16.] An order was made adjudging Collins to be a bank-

rupt in accordance with said formal findings. A review was taken and on representation of the bankrupt that his wife had been ill in the hospital, at the conclusion of the hearing, Judge Yankwich remanded the matter to Referee Brink to take her testimony and determine again what he considered the true facts regarding the homestead, which stood in the wife's name. Her testimony was taken starting at page 281 of the Transcript. She testified that she had no conversation with Mr. Collins as to how the property should be vested; that he never told her to have the property deeded to her in her name only; that he never told her that the property was hers and that she never considered the property her separate property. She admitted on cross-examination that she had charge of the opening of the escrow, but that she did not know whether she had directed it to be put in her name, that it was done as a matter of convenience so that she could take care of things so that he could go back east and get the money.

In response to the question:

> "Q. You were the one that directed the deed to be made to you?"

She answered:

> "A. I don't know whether I should answer 'yes' or 'no.' Do you have to direct someone?"

We have gone into detail on the testimony to an unusual extent for the purpose of demonstrating the conflict in the evidence and the confusion between the bankrupt and his wife as to whether or not the home property which in any event was safe from attack by creditors should be considered as the wife's separate property or community property. The Referee in Bankruptcy, Honorable Benno M. Brink, was the original trier of the facts. He saw the witnesses and had a chance to judge their credibility.

He conscientiously tried to reconcile the shifty and evasive testimony of Collins into some sort of pattern whereby he could determine the truth. He wound up at page 286 of the Transcript by stating from the bench that Collins' testimony was so utterly unreliable that the court could not place any confidence in it, and at page 293 he commented on the fact that Mrs. Collins was simply going along with him.

Specifications of Error.

The specifications of error here are so closely related that they can all be grouped under one discussion. We contend that the District Judge erred in reversing the Referee's order adjudicating the bankrupt to be a bankrupt; that he erred in not confirming the Referee's order, and in point III that he erred in attempting on a cold record of conflicting evidence to evaluate the testimony of the bankrupt and his wife as to the value of the bankrupt's homestead, and in finding that the bankrupt's assets exceeded his liabilities, and in reversing the order made by the trier of facts, the Referee, who had seen the witnesses, heard them testify and judged their credibility.

The Law.

We believe that the court cannot but feel after a careful reading of the record in this case that Referee Brink exerted the utmost of patience and fairness in the face of a conflicting mass of testimony largely given by a slippery, elusive and mendacious bankrupt. This bankrupt was ready to pattern his testimony to support his own convenience at any given moment. When the receiver was trying to locate assets, he conveniently told the first of two stories; namely, that his wife claimed to own the home in which they lived. He conveniently forgot about

the accounts receivable which he paraded before the court under such cryptic names as "Tex," "Smitty," "Clete," "Sites," "Jimmy," "Cliff" and "Bart," with no addresses at which they could be located. He listed life insurance policies on the lives of his children and wife, and even a health and accident policy, as assets. He had transferred his only available non-exempt, valuable asset, his liquor license worth between $4,500.00 and $5,000.00, to a friend of his, Fred De Carlo, for nothing, and had done this in the face of two or three judgments in the Municipal Court held against him by the Intrastate Credit Bureau. [Tr. pp. 83, 84.] He had removed all of the liquor from his place of business and dissipated it either by drinking it himself, passing it out for Christmas presents, or at parties. His home had a declaration of homestead on it and was safe from creditors. His life insurance was likewise beyond the reach of creditors. (See Cal. Code Civ. Proc., Sec. 690.19.) His household furniture was likewise exempt under Section 690.2 of the Code of Civil Procedure. Yet, he persisted in placing fantastic values on non-existent assets, in utter disregard of the rights of his creditors to realize what they could out of the liquor license which he had given away to De Carlo. Referee Brink, after repeated hearings beginning September 6, 1955, and recurring on November 4, 1955, November 14, 1955, December 5, 6 and 8, 1955, lost all confidence in the bankrupt's integrity and honesty, and was satisfied in his own mind that the bankrupt was not telling the truth. The District Judge, acting as a reviewing court under Section 39c of the National Bankruptcy Act (11 U. S. C. A., Sec. 67c), attempted to evaluate the conflicting testimony in this case, and we submit erred in reversing the Referee on findings of fact based on conflicting evidence.

In so far as the bankrupt's homestead is concerned, the fact remains that the Referee was the Judge of the credibility of the witnesses as to the circumstances surrounding the taking of the title in the bankrupt's wife's name. In the first place, *Section 164 of the Civil Code of California* raises the presumption that:

> "Whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument."

This presumption is evidence and is disputable, but the sufficiency of the testimony to refute it is within the sound discretion of the trier of fact.

In the case of *Auener v. Suiter,* 46 Cal. App. 301 at 304, the court said:

> "We have, then, a case where the wife held a grant, bargain, and sale deed of the property executed to her as sole grantee. This is strong evidence in favor of the respondent's case and must prevail unless overcome by other evidence.
>
> It is true that the presumption established by section 164 of the Civil Code is not conclusive but may be disputed and overcome by other testimony. Nevertheless, however, the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overthrown by other testimony. (Volguards v. Myers, 23 Cal. App. 500.)

The other evidence in the case showing the community source of the purchase price, the testimony of the plaintiff that he did not give the property to his wife, only raises a conflict of evidence upon the issue, and the force of it as tending to overcome the presumption was somewhat weakened by the appellant's testimony to the effect that before the deed was made he and his wife had talked it over and she wanted it in her name because she thought he would die first and such a deed would cause her less expense and trouble.

The presumption declared in section 164, although disputable, is itself evidence, and it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose. (Pabst v. Shearer, 172 Cal. 239; Gilmour v. North Pasadena Land etc. Co., 178 Cal. 6.)

Treating the presumption as evidence, we have a case wherein the trial court has made a finding upon conflicting evidence. It has found that the presumption has not been overcome. Its finding has evidence to support it. We see *no legal cause to interfere with its conclusions."* (Italics ours.)

In the case of *Nichols v. Mitchell,* 32 Cal. 2d 508, the Supreme Court of California in discussing the argument that no evidence was introduced to dispel the presumption raised by Section 164 of the Civil Code, at page 606, said:

"But the trial court was not concluded by defendants' testimony as to the source of the consideration for the purchase of the property. It was entitled to consider the situation of the parties at the time of the purchase in 1937, the circumstances that may have occasioned the placing of the title in Mrs. Mitchell's name, and the legitimate inferences arising therefrom which precipitated into essential conflict

the issue as to the separate or community character of the property. This province of the trial court to resolve 'conflicting evidence or conflicting inferences' and to reach a conclusion that will not be disturbed 'on appeal if some substantial evidence or reasonable inference' lends support thereto (Security-First National Bank v. Bruder, 44 Cal. App. 2d 767, 772) was forcefully declared in the recent case of Hicks v. Reis, 21 Cal. 2d 654, at pages 659-660: 'The trier of the facts is the exclusive judge of the credibility of the witnesses. (Sec. 1847, Code Civ. Proc.) While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony . . . or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. (Citing atuhority.) Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness even though the witness is uncontradicted. (Citing cases.) . . . (As) the court, in Market Street Ry. Co. v. George, 116 Cal. App. 572, 576, stated: 'It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and if they do refuse it credence it is of no more effect that if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted.' "

For additional authorities on the subject of the discretion of the trial court we cite *Nevins v. Nevins,* 129 Cal. 2d 150, 154; *Fanning v. Green,* 156 Cal. 279, 284, and *Estate of Jolly,* 196 Cal. 547.

In the case at bar, the Referee was not satisfied by the testimony of the bankrupt and his wife that they had overcome the presumption contained in Section 164 of the Civil Code especially in view of the bankrupt's earlier testimony *that his wife claimed that the home belonged to her.* [Tr. p. 56.] He only changed his testimony when he realized that it would take the value of the homestead to make him solvent and thus escape the consequences of a bankruptcy proceeding which would probably result in setting aside the fraudulent transfer of his liquor license and possible denial of his discharge.

The District Judge Erred in Evaluating the Testimony Given Before the Referee Who Had an Opportunity to See the Witnesses, Judge Their Attitude and Demeanor and Ascertain Their Credibility.

Prior to the amendment of 1938, the Referee in bankruptcy was a mere arm of the court and had decidedly limited jurisdictional powers. In connection with an adjudication, a matter could be referred to him as Special Master to hear and report the facts to the District Judge who alone could make an adjudication in a contested case. (See Collier on Bankruptcy (14th Ed.), Sec. 22.01, p. 402.) In the same volume of Collier at page 1399, Section 38.03, the author says:

> "Under the terms of clause (1) of Sec. 38, referees are invested with jurisdiction to 'consider all petitions referred to them and make the adjudications or dismiss the petitions.' Before amendment by the 1938

Act, this clause contained the phrase 'by the clerks', which immediately followed the word 'them.' This was because under the former Act no reference of any petition could be made until after an adjudication, except in certain circumstances where the judge was absent from the district or division of the district in which the petition was filed. In the latter case the clerk could then refer the matter to the referee. Although judges frequently referred the issues to a referee as a special master to hear and report, the referee could not decide the issue of adjudication.

The old procedure, however, was altered under the 1938 Act by the amendment of Sec. 22, and the rephrasing of Sec. 38(1). Under the present law, reference to a referee as such may be made 'at any stage of the proceedings', and in all involuntary cases, therefore, under the terms of Sec. 38(1), the referee may make the adjudication or dismiss the petition, if the case is referred prior to such action. In voluntary cases, except where a partnership petition is filed by less than all the partners, the provisions of Sec. 18g appear to require that the judge make the adjudication."

In the case of *Ott v. Thurston,* 76 F. 2d 368, the court said:

"Another error stressed by appellant is that the Judge of the District Court erred in holding that where the evidence introduced before the referee in bankruptcy was conflicting, he was not at liberty to disregard the referee's findings. In that connection, the District Court stated in its opinion: 'The evidence was at least conflicting, the District Court is not at liberty to disregard the Referee's findings, for they find sufficient support in the evidence,.' The court was here expressing the general rule of practice on review or appeal.

It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court. In re Stout, 109 F. 794 (D. C. Mo.). See, also, In re Noyes Bros., 127 F. 286 (C. C. A. 1).

As stated in O'Brien's Manual of Federal Appellate Procedure (1934 Cum. Supp., p. 63): 'The Court of Appeals for the Ninth Circuit, quotes with approval the language of Remington on Bankruptcy, footnote to Sec. 3871, 4th Ed., Vol. 8, p. 227: "And it is especially true that the reviewing courts will not disturb findings of fact except for manifest error, where both the referee and the district judge have coincided." And the findings of a chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' Neece v. Durst, 61 F. (2d) 591, 593 (C. C. A. 9); Swift v. Higgins, 72 F. (2d) 791, 796 (C. C. A. 9); Exchange Nat. Bank v. Meikle, 61 F. (2d) 176, 179 (C. C. A. 9)."

This rule was followed by Judge Yankwich's colleague, Judge James M. Carter, in *In the Matter of Lawrence Leo Duffin, Debtor,* 141 Fed. Supp. 869 at 870:

"The district court is not at liberty to disregard the referee's findings where they have sufficient support in the evidence, and the findings of the referee will not be overturned unless they are clearly erroneous. Ott v. Thurston, 9 Cir., 1935, 76 F. 2d 368; Powell v. Wumkes, 9 Cir., 1944, 142 F. 2d 4; In re F. P. Newport Corp., D. C. Cal., 1954, 123 F. Supp. 95.

Petitioners argue that thie testimony regarding the privilege to use the dance area—by the bar patrons and during the hours that the band was not present —was uncontradicted and that the findings of the referee contrary to such testimony are erroneous. The proposition that where a witness' testimony is not contradicted, the trier of fact has no right to refuse to accept it, is erroneous. If the testimony lacked credibility it was not proof, even if uncontradicted. N. L. R. B. v. Howell Chevrolet Co., 9 Cir., 1953, 204 F. 2d 79; Quon v. Niagara Fire Ins. Co. of N. Y., 9 Cir., 1951, 190 F. 2d 257; Herbert v. Riddell, D. C. Cal., 1952, 103 F. Supp. 369. Furthermore, such testimony may satisfy the trier of fact not only that the witness' testimony is not true, but that the truth is the opposite of his story, N. L. R. B. v. Howell Chevrolet Co., *supra*. The referee had the opportunity to observe the manner and demeanor of the witness. Furthermore the physical arrangement of the premises and the lack of visible notices not to use the dancing area was evidence giving support to the referee's findings."

In the case at bar, the testimony of the bankrupt, himself, that his wife claimed to own the property occupied by them as their home, coupled with the physical fact that the title was taken expressly in her name, created a substantial conflict in the evidence which the Referee, who saw the witnesses, was in a far better position to evaluate than would a District Judge sitting as a reviewing court and examining a cold record.

Conclusion.

We respectfully submit that the District Judge was in error in reversing Referee Brink in this instance. Throughout the entire record one cannot but observe a pattern of chicanery and fraud on the part of this alleged bankrupt. He and his wife came out here from New York State leaving behind them bank accounts in Niagara Falls apparently standing in both their names. New York is not a community property state, and a married woman has all rights in respect to property, real or personal, and acquisition, use, enjoyment, and disposition thereof, to make contracts in respect thereto, and to carry on any business, trade, or occupation, and to exercise all powers and convey all rights in respect thereto in respect to her contracts and be liable on such contracts as if she were unmarried. (See New York Domestic Relations Law, Sec. 51.) They decided to buy a house in California, after they came here [Tr. p. 198], and the bankrupt appears to have engaged in other business enterprises preceding his venture in Stan's Stage Coach Stop. One of these was money lending. [Tr. p. 59.] Another was the ownership of a drinking establishment known as The Schooner. [Tr. p. 138.] They took the title to their home in the name of Ada J. Collins, the bankrupt's wife. The bankrupt then went into the cocktail lounge with Stan Lefringhouse and obtained a liquor license which was issued in the name of the bankrupt alone, although the money used to induce Trapini to "grease the tracks" for the issuance of such license appears to have come from Lefringhouse. [Tr. p. 257.]

Stan's Stage Coach Stop was opened with the stock, fixtures, equipment, and everything but the license having been paid for by Lefringhouse. Differences arose between

the bankrupt and Lefringhouse, and the bankrupt, after incurring substantial liabilities in the operation of the business, looted the same of the stock in trade, took the liquor out to his home and placed it in his garage, took the license off the wall, and transferred it to a friend, Fred De Carlo. [Tr. p. 110.] No consideration whatever was paid the bankrupt for this license. [Tr. pp. 78-79.] He transferred it within four months of the filing of the petition without any consideration whatsoever, and that notwithstanding the fact that there were suits pending against him, or judgments already rendered in the Municipal Court of the Los Angeles Judicial District, and one in the Superior Court brought by his brother against him and Lefringhouse, in which case he had conveniently not been served, although Lefringhouse was. He claimed to have accumulated $1,500.00 in uncashed compensation checks which he did not disclose to his receiver. The first any one learned of their existence was early in the trial of the contested adjudication which started November 4, 1955, when he endeavored to set them up as an asset to prove his solvency. A demand that he produce these alleged uncashed compensation checks for our examination resulted in his testifying that he had cashed them all, and although he had represented to the court in his list of assets and liabilities that he had $1,500.00 of compensation checks uncashed, it later developed beyond all certainty that such representation was false and not true.

He produced as alleged assets life insurance policies on the lives of his wife and his children in which he had no interest whatever in the cash surrender value. He produced a list of accounts receivable with cryptic names, no addresses, and had the effrontery to value them at $2,200.00.

At the conclusion of all the evidence, the Referee declined to give his testimony any more credibility than he would accord to the mythical Baron Munchauson, and found his self-serving testimony to be untrue.

On the earnest plea that Mrs. Collins had been in the hospital, at least on the last day of the trial, Judge Yankwich remanded the matter to Referee Brink to take her testimony and to consider the entire matter in the light of such additional testimony. This, Referee Brink did. He listened to her testimony and was convinced from her hesitating manner, for example, answer at Transcript, page 284:

"It is in my name. Is that what you want me to say?"

that Mrs. Collins was merely going along with her husband in asserting the property which was already exempt as a homestead was community property. The Referee was emphatic in his statements from the bench and in his Certificate on Review [Tr. p. 28], that he did not believe the testimony given by John Collins as to the circumstances in which the title to the home was taken in the name of the wife, and that his position is not changed from that originally taken because he is of the view that "the testimony of both the bankrupt and his wife to be entirely self-serving and unworthy of belief by this court."

This is not a case where a trier of fact made simple findings and is therefore presumed to have believed one set of witnesses and not another. In this case, the Referee emphatically stated that he did not believe the testimony of either Collins or his wife. Thus, the question of credibility was definitely passed on twice by the Referee, and after the second review, reversed by the District Judge on a cold record.

As was stated by Circuit Judge Lemmon in the recent case of *Autrey Brothers, et al. v. Chichester,* No. 15093, decided January 18, 1957:

> "We have frequently adverted to the well-established principle that 'courts of bankruptcy are essentially courts of equity.' Judged in accordance with an equitable norm, the individual and corporate manipulations of the appellants herein with reference to the bankrupt's property, are such as to offend the conscience of a discerning chancellor."

In the case at bar, the conduct of Collins throughout was such as to offend the conscience of the discerning chancellor Referee Benno M. Brink who saw the witnesses and heard the testimony firsthand over a period of days. His findings on the evidence were emphatic, and we submit that the District Judge erred in reversing his order of adjudication.

We respectfully submit that the order of the District Judge should be reversed with directions to affirm the order of the Referee.

Respectfully submitted this 13th day of February, 1957.

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